IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 73

ARMOUR & COMPANY,

Petitioner,

vs.

ADAM WANTOCK and FRANK SMITH,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

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STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

The following statement by respondents is supplementary to the statement by petitioner on page 3 of its brief.

It was stipulated at the trial that Frank Smith, one of the plaintiffs, if called as a witness, would testify as follows:

From 5:00 P.M. until the following morning at 8:00 A.M., he was required to stay on the premises to serve as a fire guard, and to respond to any call by company watchman reporting a fire or fire-fighting equipment out of order. During such period, plaintiff was not allowed to leave the premises of the fire hall, the fire hall being a part of the company premises, and was required to prepare and eat his meals on the premises. Facilities were furnished by the Company for the preparation of meals, but food was furnished by the plaintiff.* * * He was required to punch the time clock again, and remain on the premises (Rec. 8) and carry on the same duties and responsibilities as required the night before.* * * He was on the premises forty-eight hours at a stretch * * *. After December 2, 1939, he would be on a twenty-four hour shift and be off for twenty-four hours * * * and remain on the premises from 5:00 P.M. to 8:00 A.M. to answer any calls for fire duty within the premises of the plant until the next morning at 8:00 A.M., at which time he was to leave for home * * *. During the night hours from 5:00 P.M. to 8:00 A.M. the next morning, plaintiff was to eat on the premises and could not leave the immediate vicinity of the fire hall; * * * During the hours from 5:00 P.M. each day on duty, to 8:00 A.M. the next day, he was required to (Rec. 9) remain in the immediate vicinity of the fire hall during all this period and to answer any fire calls made by watchmen and to fight fires as they occurred. During these hours, if a sprinkler break was reported by watchmen, he was required to make temporary repairs. During this period, upon being notified by the watchmen that fire extinguishers and fire barrels were not filled or in proper order, he was required to fill and put same in proper condition.* * * He was not informed that he could, and did not in fact, engage in any other gainful employment during the hours from 5:00 P.M. to 8:00 A.M. But he

occupied his time during such hours as he desired, save when responding to emergency calls, as above explained. During this period, he could not leave the vicinity of the fire hall for any purpose whatever, and was on call of the defendant's watchmen at all times for the purposes heretofore recited (Rec. 10).

The plaintiff Smith was fifty-five years old at the time of the stipulation, and had been in the employ of the defendant, petitioner here, as a fire marshal since 1919 to the date of the stipulation (Rec. 8).

It was further stipulated at the trial that the witness, Arthur J. Clauter, if called as a witness for defendant, would testify as follows (Rec. 10):

That he is assistant general superintendent of the plant, commonly known as the Armour Soap Works, and that during the time involved herein and long prior thereto, it was and is the practice of the Company to operate its full time firemen (*i.e.* men employed for no purpose save * * * the extinguishment of fires occurring on the premises) to require their presence on the premises * * * for one shift * * * after which he was entirely free of any obligation to the Company (Rec. 11) for a shift of equal duration * * * each shift during which the fireman was on the premises was divided into working time and stand-by time. * * * At 5:00 P.M. the fireman then retired to the fire hall provided by the Company and slept * * * he was free to sleep * * * always subject to call by the watchmen (Rec. 12); * * * it is their (the watchman's) duty to call the fire hall and call out sufficient firemen to handle the emergency situation. Subject to call from a watchman, the men present at the fire hall were not required to do any work or labor * * * between the hours of 5:00 P.M. to 8:00 A.M. the following morning. (Rec. 13); * * * the specific weekly salary paid to Smith was $35.55; to

Wantock, $30.35. Such sums were paid to the plaintiffs, regardless of whether they were on duty three, four, or five days each week; regardless of whether the total hours spent on defendant's premises each week were 70½ hours or 117½ hours; regardless of whether the hours spent at physical labor were 25½ hours or 50 hours; regardless of whether the time expended in the fire hall on defendant's premises after 5:00 P.M. and prior to the following 8:00 A.M. were 45 hours or 75 hours in any one week (Rec. 14).

It was further stipulated at the trial that D. C. von Behren, if called as a witness for the defendant, petitioner here, would testify as follows (Rec. 15):

"* * * The fire insurance companies would not insure the premises at all unless an hourly watching service were maintained (Rec. 16).

Questions Presented.

The questions for decision in this case are not accurately stated by counsel for petitioner. In our view of the case, the questions are as follows:

1. Are the plaintiffs, although not technically watchmen in the sense that they had definite rounds to patrol, but who were watchmen in the generic sense of the word, in that they guarded and protected the premises wherein the petitioner manufactured goods for interstate commerce, and the raw materials, goods in process and finished products from destructive fires, covered by the Act?

2. Were the plaintiffs "employed" within the meaning of the Act during their night shift, when they were at all times on duty and subject to emergency fire calls, though not actually engaged in the manual labor of repairing fire fighting equipment and extinguishing fires?

SUMMARY OF ARGUMENT.

SECTION I. The plaintiffs in this case, respondents here, are covered by the Act.

Though not strictly watchmen, in the sense that they patrolled a specific round, they were watchmen with definite specified duties to protect and preserve the premises and the raw materials, goods in process and finished products, destined for interstate commerce, from damage by a destructive fire, which "certainly would have a substantial effect upon the amount of goods moved from the plant into other states." (Testimony of William E. Oyler, called as a witness on behalf of defendant, on cross-examination, Rec. 22.)

Though the plaintiffs, respondents here, had no primary responsibility for detecting or discovering fires, threatening damage or destruction to the plant and goods therein, nevertheless, they did have a primary responsibility for extinguishing such fires, and thus protecting the plant and materials therein from destruction.

SECTION II. The plaintiffs, respondents here, were "employed" within the meaning of the Act during the night shift.

The Act does not require the performance of actual physical labor on the part of employees entitled to the benefit of the Act.

"Employ" includes "to suffer or permit to work" (Fair Labor Standards Act, Section 3g).

No employer shall * * * *employ* any of his em-

ployees, etc.* * * unless such *employee* receives compensation for his *employment* in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is *employed* (Fair Labor Standards Act, Section 7a).

"Employee" includes any individual *employed* by an employer (Fair Labor Standards Act, Section 3e).

"Industry" means a business * * * in which individuals are gainfully *employed* (Fair Labor Standards Act, Section 3h).

SECTION III. The trial court and the Circuit Court of Appeals both erred in excluding time spent by the plaintiffs in sleeping, though subject to call during their sleeping hours, from their "work week," and in not including the hours spent in sleeping in their "workweek."

ARGUMENT.

The Plaintiffs Are Covered by the Act.

It appears from the evidence stipulated in the trial court, excerpts of which are set forth herein on pages 2, 3, and 4, that the plaintiff Smith, at least, was an old experienced employee who had been in the employ of the Company since 1919 as a fire marshal. During this period of time, he undoubtedly had been trained and had acquired skill in the prompt and efficient control and extinguishment of fires. He was paid a weekly wage of $35.00, regardless of whether his work week consisted of 45 hours or 75 hours of stand-by time in addition to 25½ hours or 50 hours spent at physical labor during the daytime.

In addition to these money wages, and as part of their total compensation, the plaintiffs upon retiring to the fire hall, were allowed to prepare their meals, and were free to occupy their time as they desired, by reading, listening to radio programs, playing cards or other games, or otherwise occupying themselves, and were free to sleep if they desired until necessary for them to punch the clock and report for active physical labor at 8:00 A.M. the next morning. This compensation in addition to the money wages was part of an entire consideration for the services rendered by the plaintiff to the Company, and was not apportionable nor apportioned to the nighttime employment. This fact distinguishes the present case from the case of *Skidmore* v. *Swift & Co.*, 136 Fed. (2nd) 112, where it was definitely established that the plaintiffs in that case received extra compensation for their time and services during the nighttime hours, which they spent on the

company's premises in addition to their regular working time.

The argument of counsel for petitioner that employees must engage in manual labor in order to be covered by the Act is fallacious. Nowhere in the Act are the words "manual labor" used, and the word "work" is used only once, in Section 3g, where it is used to explain what is included by the word "employ," but not as a definition of the word "employ." The Century Dictionary, Revised Edition, 1914, defines "employ" as "to give occupation to; to make use of the time, attention or labor of," and the word "employment" is defined as "the act of employing or using, or the state of being employed."

The question of the coverage of such employees as the plaintiffs would seem to have been definitively settled by the decision of this Court in the case of *Walton* v. *Southern Package Co.*, 320 U. S. 540, in which the plaintiff was a night watchman who aided in protecting the building, machinery and equipment from injury or destruction by fire or trespass, and the insurance rates were reduced on condition that a night watchman be kept on guard. In that case, this Court said:

> "His duty (that of the plaintiff) was to aid in protecting the building, machinery and equipment from injury or destruction by fire or trespass. The mere fact that a fire insurance company was willing to reduce its premium upon condition that a night watchman be kept on guard is evidence that a watchman would make a valuable contribution to the continuous production of respondent's goods. The maintenance of a safe habitable building is indispensable to that activity. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524. The relationship of Walton's employment to production was, therefore, not 'tenuous,' but had that 'close and immediate tie with the process of production for commerce,' which brought him within the coverage of the Act."

The overwhelming weight of authority is that night watchmen, who have no duties whatever in connection with the actual handling of the goods produced by the employer, but who are merely charged with protecting and preserving the buildings and machinery used by others to produce goods for commerce, perform duties having an essential relationship to the process of producing and distributing goods for interstate commerce. Some of the principal cases are the following:

Walling v. *Sondock*, 132 Fed. (2nd) 77.

Slover v. *Wathen*, 140 Fed. (2nd) 259.

Hargrave v. *Mid-Continent Oil Co.*, 129 Fed. (2nd) 655.

The Plaintiffs Were "Employed" Within the Meaning of the Act.

We contend that the plaintiffs were "employed" within the meaning of the Act during the whole of the night shift between 5:00 P.M. and 8:00 A.M. the following morning. The evidence shows that during these fifteen hours, they were required to remain on the premises and were at all times subject to emergency call to protect and preserve the premises and the goods therein from fire and leaking sprinkler systems, etc. It was part of the contract of employment between the plaintiffs and the defendant Company that the plaintiffs should not leave the premises and were required to sleep on the premises and prepare and eat their meals there, and during these hours they were required to answer any calls for fire within the premises, and to fight fires as they occurred, and to make temporary repairs if a sprinkler should break, and fill fire extinguishers and fire barrels, and put same in proper condition. The plaintiffs did not engage in any other gainful employment

during these fifteen hours, but it was part of the contract of employment between the plaintiffs and the defendant Company that they might occupy their time during said hours as they desired, save when responding to emergency calls, and that they were on call at all times for said purposes. The plaintiffs did not receive any additional money wages or other compensation for performing these duties and for remaining on the premises during the night hours, but the money wages and the sleeping and eating accommodations were one entire, whole consideration, and no part of the consideration was apportionable nor apportioned to compensate them for the performance of their obligation to the Company of remaining on the premises and holding themselves in readiness to answer any emergency calls. In this respect the instant case is distinguishable from the case of *Skidmore* v. *Swift & Co.*, 136 Fed. (2nd) 112.

There are numerous cases holding that an employee is covered by the Act during the whole of the time when he is employed even though he merely holds himself in readiness to answer whatever calls may be made upon him for his actual physical labor. Some of these cases are the following:

Walling v. *Allied Messenger Service, Inc.*, 47 Fed. Sup. 773.

Travis V. Ray, 41 Fed. Sup. 6.

Overstreet v. North Shore Corp., 318 U. S. 125.

In the case of *Travis* v. *Ray*, 41 Fed. Sup. 6, the employee was permitted to sleep during his waiting hours, and yet the court held that he was covered by the Act during the whole of his waiting time, even though he slept during part of it.

In the recent case of *Tennessee Coal I. & R. Co.* v. *Muscoda Lodge,* 88 U. S., Law Ed. 610, this court said that a man's work is what he does for his employer and as consideration for the wage he receives; that the word "work" as used in the Act means the actual service rendered to the employer for which he pays wages in conformity to the contract of employment (page 620), and that the Act was intended to permit courts to designate as employment that which both employer and employee have always regarded as employment, even though such employment involved no arduous or burdensome duties (page 624). The evidence in this case shows that the employment of these plaintiffs involved their remaining on the premises during the whole of the night shift, and holding themselves in readiness for any emergency calls that might arise. The employer knew, from long experience of many years prior to the effective date of the Act, that emergency calls would be relatively few and that each call would be of short duration. It was, however, to its very substantial benefit to employ professional, trained and skilled fire fighters in order to procure a reduction in its fire insurance cost. Even without any reduction in cost, the preservation of the plant and goods therein from a destructive fire contributed an essential element to the orderly and efficient and continuous quantity production of the goods manufactured by the defendant intended for interstate commerce.

If the argument of counsel for petitioner in this case had been accepted and applied in the case of *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, the employees in that case would have been covered by the Act only during the time when they were actually engaged in the physical labor of pulling switches and levers, turning

wheels and otherwise physically operating the machinery for raising and lowering the drawbridge. But this court, and the courts below in that case, rejected that argument, and held that the employees were covered by the Act during the whole period of their employment, even when they were at rest, waiting for an occasion to engage in the physical manual labor of operating the machinery for raising and lowering the drawbridge.

It was said by this court in the case of *Tennessee Coal I. & R. Co.* v. *Muscoda Local,* 88 U. S., Law Ed., 610, at page 618,

> "We have then a judgment of two courts based upon findings with ample evidence to warrant such findings. Affirmance by this court is therefore demanded.
>
> "The seasoned and wise rule of this court makes concurrent findings of two courts below final in the absence of very exceptional showing of error." (Citing numerous cases.)

We have in the instant case the findings of two courts as to what the "work week" of the plaintiffs consisted of, and the petitioner has shown no error whatever in such findings, nor any departure from the uniform rulings of this and most other courts in deciding what the "work week" consisted of.

The Courts Below Erred in not Including the Sleeping Hours of the Plaintiffs in Their Work-Week.

It is undisputed, and not denied by the defendant, that the plaintiffs were in the employ of the defendant during the whole of the fifteen hours between 5:00 P.M.

and 8:00 A.M. the following morning, and that they were subject to call at any time during those hours.

If the plaintiffs in this case were covered at all by the Act, then they were covered during the whole of the time of their employment, during which they were to render services to their employer. Consequently, we ask this court to correct the error of the Courts below by modifying the judgments of those courts so as to include the whole of the night shift within the "work week" of the plaintiffs.

CONCLUSION.

The evidence shows that the plaintiffs, who had no responsibility whatever for the discovery of fires in the plant, did have, not only primary but, exclusive responsibility for extinguishing such fires, or at least holding them under control until the city fire department could be summoned. There is no evidence that the watchmen, as distinguished from the plaintiffs, who were technically called fire fighters, had any responsibility for extinguishing or controlling fires. We, therefore, submit that the plaintiffs were engaged in an occupation necessary to the protection of goods, as that phrase has been interpreted, construed and applied by this court, and that, therefore, they are covered by the Act.

Since the Act applies to employees in their employment and occupation, it is fallacious to argue that the Act applies only to that portion of the time when the employees are engaged in actual manual labor. The Act is so broad that it covers *employment*, and not merely

work, as defined by counsel for petitioner, during part of the time of employment. We, therefore, respectfully submit that the judgments of the courts below should be affirmed with the modification which we have indicated above.

Dated at Chicago, September 29, 1944.

Respectfully submitted,

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